

**OPEN RECORDS AND MEETINGS OPINION
2001-O-07**

DATE ISSUED: August 6, 2001

ISSUED TO: Steven McCullough, Kindred City Attorney

CITIZEN'S REQUEST FOR OPINION

On June 25, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Tim Hill asking whether the City of Kindred violated N.D.C.C. § 44-04-20 by holding a meeting that was not preceded by sufficient public notice.

FACTS PRESENTED

The Kindred City Council (City) held a special meeting on June 19, 2001. The meeting lasted for roughly one hour and was limited to discussion of a proposed expansion of a local elevator and related issues. A reporter for the official city newspaper did receive personal notice of the meeting, attended the meeting, and tape-recorded the discussion at the meeting. In a letter dated October 10, 2000, Mr. Hill asked for notices of all meetings of the city council, but he did not receive notice of the June 19 special meeting. In response to the request for this opinion, the City acknowledges receiving Mr. Hill's request for notice but failing to provide him the requested notice. The City also admits "no written notice [of the June 19 meeting] was prepared [or] posted as required by section 44-04-20 of the North Dakota Century Code." Letter from City Attorney Steven McCullough (July 19, 2001). The City prepared a transcript of its June 19 meeting based on the reporter's recording of the meeting and has provided a copy of the transcript to this office and Mr. Hill.

ISSUE

Whether the June 19, 2001, special meeting of the Kindred City Council was preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.

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ANALYSIS

Written public notice must be provided in advance of all meetings that are required to be open to the public under N.D.C.C. § 44-04-19, the state open meetings law. N.D.C.C. § 44-04-20(1). The notice must be filed in the appropriate central location (the office of city auditor or designee for city-level governing bodies), posted at the public entity's main office (if it has one), and posted at the location of the meeting if the meeting is held somewhere other than at the public entity's main office. N.D.C.C. § 44-04-20(4). Notice must also be provided to anyone who has asked for it. N.D.C.C. § 44-04-20(5). In addition, for special meetings, notice must be provided to the City's official newspaper and any representative of the news media who has requested notice.

The City admits it failed to prepare a written notice of its June 19 meeting. Nothing was filed or posted regarding the meeting and Mr. Hill was not notified of the meeting. It is my opinion that the City violated N.D.C.C. § 44-04-20 by failing to provide public notice of its June 19, 2001, meeting.

Mr. Hill suggests the City's violation was intentional, based in part on an alleged notice violation in July 2000. The City disputes this allegation, stating its failure to provide notice of the June 19 meeting was based on the unavoidable absence of the city auditor and on incorrect information it received regarding its obligation to provide personal notice of meetings upon request. In issuing an opinion under N.D.C.C. § 44-04-21.1, it makes no difference whether a violation was accidental or intentional. We must determine only whether a violation has occurred. Accordingly, I express no opinion on whether the City's violation was intentional.

Mr. Hill and the City also disagree on whether final action on an item of city business was taken at the June 19, 2001, meeting. A gathering of a quorum of the members of a governing body of a public entity is a "meeting" under the open meetings law and is required to be preceded by public notice even if no final action is taken during the meeting. See 1998 N.D. Op. Att'y Gen. O-08. In addressing the City's alleged violation of N.D.C.C. § 44-04-20, it makes no difference whether final action was taken at the June 19 meeting. Notice was required in either case, but was not provided. However, whether final action occurred at the meeting does affect what the City needs to do to remedy the notice violation. The transcript supports the City's position that the members of the city council simply expressed a non-binding willingness to change its previous contract proposal with the elevator. As the city attorney notes in his response, the City will still have to approve the terms of the proposed contract at a future meeting. Accordingly, no final action occurred during the June 19 meeting that would need to be ratified by the City at a properly noticed open meeting.

CONCLUSION

The Kindred City Council violated N.D.C.C. §44-04-20 by failing to provide sufficient public notice of its June 19, 2001, special meeting.

STEPS NEEDED TO REMEDY VIOLATION

The transcript of the meeting has already been provided to Mr. Hill and must be made available to any member of the public who requests it. Due to inaudible portions of the recording, the recording is not a verbatim account of the meeting. As Mr. Hill points out, an incomplete audio recording or transcript of a meeting does not include any gestures or facial expressions of the members of the governing body. Nevertheless, the transcript in this case adequately identifies the position of the Council members on the item discussed and is a more accurate reproduction of the meeting than would result from requiring the Council members to recreate their discussion at another meeting. I conclude that the City's preparation of the transcript is a sufficient remedy of the notice violation.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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